UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE LEHMAN BROTHERS 09 MD 2017 (LAK)

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April 16, 2014
10:15 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Attorneys for Plaintiffs
BY: MAX BERGER
DAVID STICKNEY

KESSLER TOPAZ MELTZER & CHECK LLP
Attorneys for Plaintiffs
BY: DAVID KESSLER

LATHAM & WATKINS LLP
Attorneys for Defendant Ernst & Young LLP
BY: MILES RUTHBERG
KEVIN MCDONOUOGH

ALSO PRESENT: JOSEPH WHITE, ESQ.
CHRIS ANDREWS, Objector

(Case called)

(In open court)

THE COURT: Good morning, folks. I've read the papers. I will be happy to hear you briefly, Mr. Berger, or whoever is going to speak. Mr. Stickney?

MR. BERGER: Thank you, your Honor. Good morning.

THE COURT: Good morning.

MR. BERGER: Good morning, your Honor. Max Berger from Bernstein Litowitz Berger & Grossmann, colead counsel for the class. With me this morning is my partner David Stickney and the colead counsel David Kessler from the Kessler Topaz Meltzer & Check firm.

First, I want to thank the court for adjusting the schedule for the hearing with the Passover holiday. It's much appreciated. We had someone from my firm by the courtroom yesterday at the time originally scheduled for the hearing just in case a class member showed up for the hearing, and only one did. Laura Campell, and I believe she is in the courtroom. Did I pronounce that correctly? She is in the courtroom today. She indicated that she had a problem with a claim that she filed, and we assured Ms. Campell that we would try to work with her to resolve any issue she has with respect to her claim. And of course if they can't be resolved, we would provide her with an appropriate amount of time, subject to your Honor, to apply to the court.

Other than Mr. Andrews, who is the objector who is in the courtroom today, no objectors or class members wishing to be heard are in the courtroom today.

After over five years of hard fought litigation, and almost two years to the day that I stood before your Honor presenting the underwriter and D&O settlements, I am delighted to present for final approval the proposed settlement of our claim against Ernst & Young, the sole remaining defendant in the equity/debt action. The settlement is $99 million. If approved, this settlement will bring the total settlements to $615,218,000, not including the structured note settlement of $120 million. The settlement funds have already been deposited.

We are very proud of the results achieved here, and we hope the court agrees that this settlement is an excellent result for the class. The court certified the settlement class and approved the notice program leading up to the settlement on December 3. Since then, over 930,000 notices have been mailed to class members. Summary notice has also been published in the Wall Street Journal and Investor's Business Daily, as well as on two websites established by lead counsel.

Moreover, the proposed settlement has received widespread publicity in the media.

Class members comprising the majority of this class are some of the largest and most sophisticated institutional

investors in the world. Many routinely object to settlements and fee requests. We are very pleased to report that not one institutional investor has objected to the settlement, the plan of allocation, or the fee request. In fact, three investors that filed individual actions have now chosen to opt back into the class.

It's also virtually unprecedented that only two individuals have filed objections. Of those two, only one, Mr. Andrews, whose losses total $600, have even provided any evidence that he is a class member. Mr. Gao has not. Both also objected to the prior settlements.

The objections have been addressed in our papers. We believe they are wholly without merit. Mr. Andrews, who submitted an 83-page objection, has largely recycled his objections to the D&O settlement. Suffice it to say, that despite his characterization of this case as a "slam dunk," "a piece of cake" and "a walk in the park," it was anything but.

THE COURT: I think I dismissed almost all of it, right?

MR. BERGER: I'm sorry.

THE COURT: I think I had dismissed almost all of it, right?

MR. BERGER: Yes, your Honor. We respectfully submit that the paucity of objections is because this is an outstanding settlement which was achieved only after the

conclusion of fact discovery and retention of experts, and also the plan of allocation and fee request fit well within the established guidelines for approval in this Circuit.

It bears noting that the reaction of the class has been described by the Second Circuit in the Walmart v. Visa case as the most significant Grinnell factor for the court to consider in considering approval. So, our papers -- your Honor has read the papers -- our papers in support of a settlement and plan of allocation are quite detailed, so if it please your Honor, I would just like to briefly summarize them.

This settlement with Ernst & Young is one of the largest securities class action settlements by an audit firm ever achieved without a financial restatement or parallel SEC or criminal proceeding. For that matter, the Department of Justice and SEC specifically declined to bring any charges against E&Y.

According to the New York Times account, they concluded that "Repo 105" -- which was at the heart of our claim -- "had nothing to do with Lehman's failure or was technically allowed under an obscure accounting rule."

In general, this case against E&Y was fraught with risk, particularly after Lehman filed for the largest bankruptcy in history three months after the case began and Lehman was no longer a viable defendant.

Following the court's decision on E&Y's motion to

dismiss, our case was reduced to our having to prove fraud in connection with one statement by E&Y arising from a single quarterly review for the second quarter of 2008 and not a year-end audit report. The claims centered around Lehman's use of Repo 105 to artificially deflate Lehman's reported net leverage ratio to create the appearance of a strong balance sheet.

It was extraordinarily difficult to establish fraud against D&Y. The examiner's report, while very helpful, did not contain evidence of fraud by E&Y. E&Y denied there was even a misstatement, let alone one that was material.

E&Y also contended that if there was a 10b violation, a hundred percent of the fault resided with others, like the officers and directors and Lehman itself under the Proportionate Fault Doctrine.

E&Y also argued the class' losses of billions of dollars were directly attributed to the financial tsunami in 2008 and not wrongdoing at Lehman. In other words, the losses had nothing whatsoever to do with Lehman's use of Repo 105. That was a very real and threatening argument, because our allegations against E&Y are based on Lehman's use of Repo 105. However, the disclosure of Repo 105 at Lehman was not revealed until 18 months after Lehman's bankruptcy. So, according to E&Y, that revelation could not have been responsible for the losses incurred by class members.

We had to depend on the doctrine of "materialization of the concealed risk" to satisfy loss causation, which was exceedingly difficult to prove in light of the overall financial meltdown which engulfed the country at that time.

Between this argument and proportional fault, damages were very problematic. Moreover, E&Y damages would have to be disaggregated from other causes.

Also, plaintiffs believed that any appeal of the dismissed claims was likely to fail.

Obviously, the law during the period of pendency of this case was evolving rapidly. For example, the Supreme Court took the Halliburton petition challenging "fraud-on-the-market" presumption -- which would have effectively ended our case if they abandoned that presumption -- they took that up one month after the settlement, and I'm sure we would not be here now with this settlement if the Supreme Court took the Halliburton case before our settlement was reached.

So, just to very briefly summarize, your Honor, regarding the stage of the proceedings in which this settlement was reached, the counsel conducted an extensive investigation, we first preserved our claims with a tolling agreement, then filed the first complaint against E&Y. We barely survived the motion to dismiss after the court limited plaintiffs' claims. We successfully moved for class cert. We reviewed 26 million pages of documents, took 50 depositions on three continents.

We moved for discovery in the UK under the Hague Convention. We consulted with and retained multiple experts, and coordinated discovery with all related state and federal litigation.

The settlement was reached only after the conclusion of fact discovery and immediately before expert reports were due to be exchanged.

The negotiations leading up to the settlement were very protracted, spanning over two years and quite difficult. E&Y would not settle unless all claims including the dismissed claims were covered. The discussions involved both formal mediations and direct talks between the general counsel of E&Y and their lawyers and plaintiffs' lead counsel. Lead counsel had the opportunity to settle for significantly less throughout the discovery period, thus minimizing our risk, but we refused, even though we knew that our lodestar would far exceed any settlement with E&Y.

Discussions were overseen by a very highly regarded mediator, Judge Phillips, and the settlement amount was endorsed by him.

The settlement class here is substantially the settlement class previously approved by the court in the D&O settlement.

In light of the above, lead counsel believe that we have obtained the best recovery reasonably possible for the

class while taking enormous risks that the recovery would amount to little or nothing at all.

If the court has questions, that ends my presentation on the proposed settlement, and for the reasons I articulated and those set forth in greater detail in our papers, we respectfully urge the court to approve the proposed settlement.

THE COURT: Are you going to address the attorneys fee issue?

MR. BERGER: Yes, your Honor.

THE COURT: Do that.

MR. BERGER: OK. Should I address the plan of allocation, or are you satisfied with that, your Honor?

THE COURT: I haven't heard any reason not to be so far. I have a specific question about -- well, why don't I hear you first on attorney fees, because you may answer my questions.

MR. BERGER: OK. So, we respectfully ask the court it to approve the attorney fees in the amount of $29.7 million and reimbursement of expenses in the amount of $4,279,706.87.

Again, our papers in support of the fee request are quite detailed. In light of this, I would just like to briefly summarize my arguments. I will also explain why we believe this extraordinary settlement -- which together with the prior settlements, as I said, total over $615 million -- was achieved by prosecuting this case efficiently and with a minimum of

duplication.

Significantly, and as stated, the class is comprised primarily of institutional investors, many of which lost their entire investments in Lehman when they filed for bankruptcy. They have every reason to be angry, yet not one institutional investor has chosen to object to plaintiffs' fee or expense request. And, as I said before, this is virtually unprecedented.

Further, only two individuals have generally objected to the fee request, and as I said, one of them is not even establishing membership in the class.

I respectfully submit the fee requested is well within -- in fact, well below -- the fee guidelines set by the courts in this District and Circuit.

Viewing the fee request on a lodestar multiplier basis -- which we know is favored by your Honor -- yields a negative multiplier err of .63 of plaintiff's counsel's time based on a lodestar of over $47 million.

I emphasize that none of this time was included in any prior fee request.

If the court awards the fee requested, and it is combined with the prior fee awards made by your Honor, plaintiffs counsel would be receiving a total fee approximately equal to their lodestar, in other words, no multiplier whatsoever despite almost six years of high risk contingent

litigation.

As recognized by the Second Circuit in Walmart v. Visa, multipliers of 3 to 4.5 are common in this Circuit.

Also, to quote your Honor, for those keeping score, the fee would represent an overall fee award when combined with the others of 14 percent of the aggregate recovery for the classes.

The Goldberger criteria have been discussed: The magnitude and complexity of the action; the risks to plaintiffs' counsel. In sum, as I say, loss causation and damages were hotly contested. As I have stated previously, both the SEC and Justice Department specifically declined to sue E&Y. Proportionate fault was a significant issue. Lehman filed for the largest bankruptcy in history. Prior to our filing our case against E&Y, the legal landscape was changing dramatically, and faith, for example, in the Second Circuit, and obviously I mentioned Halliburton before.

The Lehman examiner's report, while very helpful to us, only found that there may be evidence to support the Lehman estate's claim against E&Y for negligence, not fraud, as we were required to prove, and proof of fraud was very problematic. And of course E&Y challenged the accuracy of that report throughout.

Despite these risks, lead counsel achieved a record result for the class while seeking to recover only 60 percent

of the time they spent in prosecuting this complex action.

THE COURT: Just to anticipate what I expect to hear from Mr. Andrews, why didn't you sue them for negligence?

MR. BERGER: Well, we couldn't, your Honor.

THE COURT: Because?

MR. BERGER: I'm sorry?

THE COURT: Because?

MR. BERGER: The only claim we had against E&Y, your Honor, was for securities fraud on behalf of the investors.

THE COURT: My question is: Why didn't you sue them for negligence also?

MR. BERGER: It's not a claim that we could legally assert against --

THE COURT: Because?

MR. BERGER: Because we couldn't really sort of get a -- we couldn't represent investors suing for negligence, and it's not a cognizable claim.

THE COURT: Because of *ultra mares*?

MR. BERGER: Yes.

Your Honor, also SLUSA would have prevented that claim for us. On behalf of investors suing a class, we're basically limited to suing for fraud.

THE COURT: Thank you.

MR. BERGER: OK. So, your Honor, I mentioned the things that we had done in terms of the work that was done in

the case. The work that we did is set forth in paragraphs 18 through 60 of the joint declaration, but this was a very, very difficult claim for us to prove.

As I said, throughout the three and a half years that we were prosecuting this claim we certainly could have folded our tent and settled for significantly less. We believed in the claim. We worked very hard to prosecute it, and that required us to examine, as I say, 26 million documents, and take over 50 depositions on three continents.

We also spent approximately 117,000 hours doing over a three and a half year prosecution of the litigation. None of this time was included in any prior application by any plaintiffs' counsel seeking a fee here.

We are well aware of the court's predisposition to avoiding duplicative hours, as well as prosecuting the case efficiently, and of course that's our goal in every case.

From the outset in pretrial order number one, your Honor established an executive committee of plaintiff's counsel and was charged with certain responsibilities. I serve as chair. And in that capacity we allocated work to plaintiffs' counsel.

In connection with the fee applications here, there were a number of firms that were assigned work. We referred all counsel to the pretrial order number one, which provided that no time would be compensable unless it was performed at

the direction of the executive committee. And we believe that the time was accurately reported.

No time was included in connection with --

THE COURT: I have a specific question about at least one of these firms.

MR. BERGER: OK.

THE COURT: Where is Saxena White located?

MR. BERGER: Saxena White is located in Florida. Actually, Mr. White is in court this morning.

THE COURT: And the reason that the fee application on behalf of that firm is for a 23 month period only is what, as distinguished from the inception of the case?

MR. BERGER: Your Honor, the class representative came in at that point.

MR. WHITE: Yes, your Honor. We provided one of the lead plaintiffs, your Honor, but our direct representation in this action was related to Oklahoma Fire's participation as the sole class representative.

MR. BERGER: And when your Honor decided your motion to dismiss and narrowed the class, Mr. White's client came in to represent that limited class that remained in the litigation.

THE COURT: And I note that Mr. White's declaration says the hourly rates in computing the lodestar for that firm were the same as those accepted in other securities or

shareholder litigation. He doesn't say they are the rates his firm usually charges. I take it they're not, is that accurate?

MR. BERGER: Sorry?

THE COURT: I take it they're not their regular rates, right?

MR. WHITE: Your Honor, I am happy to respond. They are our regular rates, and those are rates that we have submitted in these District on numerous occasions.

THE COURT: So, if I wanted to come to your firm -- what town in Florida are you from?

MR. WHITE: Boca Raton.

THE COURT: Boca Raton. And if I wanted to come to your firm and hire you to contest a will, that's what you'd charge me, those rates?

MR. WHITE: My firm doesn't contest wills, your Honor. Our practice is limited solely to securities litigation both on the derivative side and the class side.

THE COURT: Why is it you submitted an affidavit saying this is what other people charge, not this is what we regularly charge?

MR. WHITE: I'm not sure of the distinction, your Honor. I think what we were trying to --

THE COURT: I know the distinction. I have an idea what my old firm charges, and I also know what the guys who have the law office down the street from my country house

charges; they're different.

MR. WHITE: Yes. The rates that we have submitted in this district previously in front of Judge Castel and other judges are consistent with the rates and actually much less than the rates of defense counsel that we have opposing us.

THE COURT: Mr. White, that's not what I'm asking you, and if I don't get a straight answer you are going to take the witness stand here.

The question is: Are the rates that were used in computing your lodestar the rates that you customarily charge paying clients in noncontingency work?

MR. WHITE: Yes, your Honor.

THE COURT: OK.

MR. BERGER: Your Honor, may I add to that, if you don't mind, just very briefly? I think most, if not all, of the firms reference rates customarily charged in the affidavits, the reason being that the vast majority of the practices that the law firms engage in who do this work on primarily a contingency basis. So, at least for most of the firms -- I know we do con charge work, for example, your Honor, and our rates are what we say they are, however, the percentage of hourly work that we do is so limited that it's not really a fair reflection.

THE COURT: Well, I understand that, and this is one of my problems with these fee applications generally, and that

is that the lodestar is truly an imaginary figure in an important sense, not entirely.

MR. BERGER: I mean I appreciate that, your Honor. I think it really is -- and we tried to sort of be accurate in our affidavits. What we measure it against -- in all honesty, what we measure it against is every year our firm takes a look, for example, at what is an appropriate hourly rate. Those are our hourly rates. That is where if someone comes to us and says to us we want to retain you on an hourly basis, what do you charge. And it's based upon we look at a whole landscape of what firms in our geographical area are charging, what defense firms that are defending our cases are charging, and so on and so forth, and invariably we find that our fees are somewhat lower than the defense fees of the lawyers defending our cases.

THE COURT: No, I'm familiar with that. And of course I've had a lot of experience with your firm and some of the other firms here, but that was only the first thing that struck me about Saxena White.

The second thing that struck me about it is that with the exception of a few people at your firm and Kessler Topaz -- who as far as I saw did most of the work in all of this -- there are only four lawyers in the hordes of them for which this overall application was made who billed 1,000 hours or more, and they are all from Saxena White, and they managed to

do it not in six years of litigation but in 23 months, and one of them averaged 224 hours per month for the whole 23 month period, in other words, claims to have been working 60 hours a week roughly year round for 23 months. Another one averaged 191 hours a month, another one 140 hours a month, and I must say it sticks out at me quite dramatically. What the devil were they doing, assuming they were doing this?

MR. BERGER: I think, your Honor, Mr. White can also respond, but there was an enormous amount of document -- Mr. White came in at a very concentrated period of time. After your Honor decided the motion to dismiss was really when we had to add Mr. White's client as a lead in the case because they were the best representative for that period of time.

In addition, Mr. White had to staff the case with lawyers from his firm. We began a very intensive document review during that period of time, and also preparing for depositions and so on and so forth. So I think that's --

THE COURT: How many depositions did Mr. White's firm take?

MR. WHITE: Your Honor, lead counsel did not ask us to take any of the depositions. We defended the deposition of the class representative and of class representative's money manager.

THE COURT: Two depositions you defended, is that right?

MR. WHITE: Yes, your Honor.

THE COURT: OK. And how did you eat up the rest of the 15,000 hours?

MR. WHITE: Your Honor, the majority of the people that you are asking questions about were document reviewers that received their assignments directly from lead counsel. The hours that they billed were reviewing documents of the 26 million pages that were reviewed. And I can tell you personally, because he worked in my office, that the attorney that you highlight was in the office 60 hours a week for that period of time.

THE COURT: For 23 months?

MR. WHITE: Your Honor, he reported --

THE COURT: Right down to January 15th of this year, long after this settlement was agreed to?

MR. WHITE: Your Honor, there were still assignments that were being assigned to us by lead counsel that he was working on, yes.

THE COURT: Mr. Berger, has your firm gone through their time records?

MR. BERGER: We have not, your Honor. What we did was we cautioned everyone -- as we had done previously -- about pretrial order number one. We received their time. We basically received affidavits from each of them with respect to their time. We made sure that they were not including any time

in their application which related to non E&Y-related work in connection with this settlement. But there were not audits. We did not review either Mr. White's or any of the other plaintiff's time records. We simply relied upon their responsibility as officers of the court to report their time accurately, subject to pretrial order number one, your Honor.

THE COURT: And the ratio here of associate hours -- which I take to be the document reviewers, right, Mr. White?

MR. WHITE: Yes, your Honor, that's correct.

THE COURT: OK -- to partner hours was approximately 15,000 associate hours to 300 partner hours.

MR. WHITE: Your Honor, I have not computed the math, but it would seem that's correct.

THE COURT: Right. So basically an hour of partner supervision for every 50 hours of associate work.

MR. WHITE: Understand, your Honor, that those associates at my firm were being directed as well by lead counsel as well as Saxena White.

So, in an effort to be efficient in the way we employed our efforts in the case, handing the assignments given to us by lead counsel, we at the partner level of the firm were involved in the deposition of defendants and the drafting of some of the papers, but the document supervision was largely done by lead counsel.

THE COURT: Were all of these associates who were

doing the document review full-time employees of your firm?

MR. WHITE: Yes, your Honor.

THE COURT: And are they still, or were they contracted in?

MR. WHITE: No, there are a couple of people who are no longer with the firm, your Honor, but the majority of them all are.

THE COURT: The majority of them all are.

MR. WHITE: Yes, sir.

THE COURT: That's an interesting formulation. Any contract lawyers who were hired for the task?

MR. WHITE: The only name that sticks out, your Honor, is Ms. Martinez, who I believe was a document reviewer we had who was a contract employee who was in New York actually.

THE COURT: And you think that $360 to $445 an hour for people to look at documents is an appropriate rate in Florida?

MR. WHITE: Well, your Honor, yes, it is, it's consistent with the rates that some of the large defense firms --

THE COURT: You think I couldn't find you as many lawyers as you could possibly hire for half that in your market?

MR. WHITE: It's possible, your Honor. Part of what we are looking for is the quality of representation. Many of

these people have joint degrees with MBAs and JDs and experience in the securities area, you know, that is part of the reason. But I am certain if your Honor were to look, you might be able to find people cheaper, yes, your Honor, but we were looking for quality as well.

MR. BERGER: Just to fully respond to your Honor's question, my partner Mr. Stickney was supervising the work of the lawyers in the case, and if he could just -- and I think Mr. White and other law firms, but particularly Mr. White's firm, was responsible for more than document review.

MR. STICKNEY: Yes. Sort of listening to the presentation and the questions about the work that Saxena White performed, in addition to the document review they were involved very much in -- we had allocated responsibilities for certain categories of discovery, and there was propounding discovery to rating agencies.

THE COURT: I can't understand you, sir.

MR. STICKNEY: I'm sorry. In addition to document review -- because we have been focusing on document review -- the Saxena White firm also was very focused on a part of our case involving the rating agencies and how rating agencies viewed net leverage issues, and so there was drafting and propounding of discovery following up with the rating agencies, all of which I coordinated with lawyers at Mr. White's firm. So, we are focusing on document review aspects of it, but there

was more to his --

THE COURT: What motions, briefs and legal memoranda did they write?

MR. STICKNEY: Well, it's internal memoranda on evidence particularly related to rating agencies. Motions and briefs, there would have been the efforts surrounding class certification, particularly the Oklahoma --

THE COURT: When did I certify the class?

MR. STICKNEY: I think it was in January 23.

THE COURT: Of what year?

MR. STICKNEY: 2013.

So, all the efforts predating that, there was a briefing period over a number of months where Mr. White's firm was involved in the drafting of our motion, particularly as it relates to the challenges to his kind as an adequate representative and the trading strategies that his kind's money managers used.

And separate and apart from that, internally we had organized the entire team across a number of law firms to have different parts of the prosecution specialize in different issues in the case, and the Saxena White firm, one of their main areas would have been concerning the efforts surrounding the rating agencies, and it involved more than just document review; it involved serving discovery. Ultimately we obtained affidavits from people. We served deposition requests. So,

the involvement of the firm I think is just better described as more than just document review.

THE COURT: I want to see the contemporaneous time records and work product from that firm.

MR. WHITE: Yes, your Honor.

THE COURT: OK. Anything else?

MR. BERGER: Well, just very briefly, your Honor, two more Goldberger factors just bear mentioning. I think your Honor has had an opportunity to witness firsthand the quality of the representation here, both lead counsel and defense counsel, and you have surely formed your own judgment. Suffice it to say that the case was defended by one of the best and most aggressive defense firms in the country.

Finally, your Honor, public policy: I believe that this Goldberger factor is very significant here because we have seen far too few prosecutions by our regulatory agencies and prosecutors arising out of the financial crisis that enveloped our country and the world these past seven years. This had engendered a greater reliance on the institutional investor community and the private securities bar. They helped the investor victims of this disaster recover their losses.

We respectfully submit that the result achieved here is a great example of the institutional investor community and the plaintiffs' securities bar stepping in to provide redress for Lehman's defrauded investors when the SEC and the Justice

Department affirmatively chose not to prosecute E&Y.

This is the only recovery from E&Y arising out of Lehman's collapse.

Respectfully, plaintiffs' counsel deserve to be paid 60 percent of their well spent time in achieving this result.

Our fee objections have been address in our papers, and I won't reiterate them here.

The expenses, your Honor, are also addressed in our papers. They consist primarily of payments for experts, database, photocopying and travel. As I say, we had to take 50 depositions on three continents. We very carefully monitored our expenses and out-of-pocket expenses in these litigations.

If the court has any further questions, I'm happy to address them.

THE COURT: Well, I guess just one that I can't resist: How did it just happen that the overall multiplier if you aggregate all three of the settlements magically comes out to one if I approve this fee application? It wasn't magic, was it?

MR. BERGER: Well, no, it was clearly -- well, it wasn't -- let's put it this way --

THE COURT: That's where you wanted to come out, and you backed this fee into it, right?

MR. BERGER: No, your Honor. That would make everything we said in our joint affidavit a felony.

THE COURT: Well, I wouldn't go that far.

MR. BERGER: No.

THE COURT: I mean I'd like to know the one thing that really worries me here.

MR. BERGER: Your Honor, you know, I respect the fact that your Honor knows me and knows my firm, and we have one abiding core value at the firm, and that is we prosecute every case the same way whether we're going to make money or lose money or whatever we do. We believe very strongly in what we do and we try to put our best effort forward.

THE COURT: I know you do.

MR. BERGER: So in all honesty it was kind of -- it was stunning to me when I saw this, and I basically said, OK, if you add it all together this is what it comes out to.

THE COURT: OK, I accept that.

MR. BERGER: Thank you, your Honor.

THE COURT: Thank you. OK. Mr. Andrews I guess wants to have a word.

MR. BERGER: Thank you very much, your Honor.

THE COURT: Thank you.

MR. ANDREWS: Good morning, Judge Kaplan.

THE COURT: Good morning.

MR. ANDREWS: My name is Chris Andrews, pro se objector. The presentation will take less than five minutes. Do I have that amount of time to speak?

THE COURT: Pardon me?

MR. ANDREWS: Can you grant me five minutes?

THE COURT: Sure.

MR. ANDREWS: The objector made the objection and this presentation on behalf of 930,000 victims, individuals and entities who lost money due in part to defendant's inactions and actions in this case. It would take 18 Yankee Stadiums filled to capacity to see every claim holder if they could be here today.

THE COURT: Well, and if they wanted to object, which they haven't.

MR. ANDREWS: I have some concerns.

THE COURT: Yes, I understand you do, and I appreciate that, and that's your right, and I am hear to listen to you, but to tell me that you would fill 18 Yankee Stadiums with people if they had the time to come is not exactly advancing the ball down the field, to stay with the sports metaphor.

MR. ANDREWS: I have a couple of questions. I don't understand why lead counsel intentionally sent the supplemental filing memorandum in further support of motion for final approval to an address where this objector moved from over two years ago, resulting in the objector receiving the documents a few days ago on Sunday, April 13, 2014 at 1:45 p.m. This caused the objector to be unable to file a surreply by design. Nowhere in the objections is that old address mentioned, only

the PO box.

I have four questions. Number one: Is there a contingency --

THE COURT: Well, the number is seasonal, I will give you that.

MR. ANDREWS: I have four questions:

Is there a contingency fee arrangement with any counsel in this case -- written, verbal, or just understood -- containing a percentage that could, if applied, result in a lower fee award? I'd like to see it if it's available.

Number two: What was the class representative's understanding of the hourly rate that was to be billed to the class; and is that in writing, or just given verbally?

Three: How is the $99 million figure arrived at?

Four: Were the copies of the other objections filed in this case for the objector and the class to review, and for me to decide whether or not to incorporate them into my objection?

A quick statement which relates back to something Mr. Berger mentioned. He mentioned that there were several claims that were dismissed, and he felt that any appeal of any dismissed claims would fail. This court ruled in the past -- most likely based on staff research -- that the use of Repo 105 complied with --

THE COURT: Mr. Andrews, it would be a grave error to

think that I relied on staff in the way you implied.

MR. ANDREWS: OK. The court ruled in the past most likely that the use of Repo 105 complied with SFAS 140, which basically caused a domino effect and thus dismissal of certain claims in 2011 and 2012. The objector believes that it might be a mistake of law or error.

I also have a proposal to make. This objector has a proposal to make to the court, plaintiffs' counsel and defense counsel, which will also be passed on to directly to defendant E&Y after the hearing. While this proposal is being evaluated by all applicable parties, the court and objector should be able to review the missing expert reports. None of the counsel here today have heard this proposal before, at least from this objector. Here it goes:

Plaintiff and defense counsel should get together and arrange to submit a joint proposal to the New York State Attorney General's office to solve an additional pending issue. The idea is for a proposed regional settlement which would cause the class fund to be revised and increased a minimum of 51 percent from $99 million to $150 million or more, and in return the New York Attorney General agrees to drop its claim for an additional $150 million it seeks as a penalty for the recovery of the fees Lehman paid to defendant that should really go into the class victim settlement fund rather than New York State's treasury.

Plaintiffs' counsel and the class win by substantially increasing the sum of the fund to whatever the final number is. Defense counsel wins by saving their client up to an additional $100 million payment to the State of New York. Under the Martin Act there will be no interim audit and failure to conform issues. The court wins by clearing its docket. The New York AG agrees and clears its docket. It looks good for Lehman stakeholder victims and in the eyes of New York voters. I think it's an idea worth exploring in the next couple of weeks.

I have two things to bring up as far as lead counsel's presentation relating to the fee issue.

Mr. Berger's firm and Mr. Kessler's firm are in the top four of the whole country as far as securities litigation. The other firms that are involved in this litigation -- one of which you mentioned earlier today -- have less experience but yet they're still billing out at rates like they reside in New York. When you go through those reports that I went through in the D&O hearing, you come away with the fact that it seems everyone is billing what is customarily approved in a court rather than what is reasonable in the area that they do business in, which you also articulated earlier.

I think the fees that all the other law firms are charging are too high, I think they should be reduced, and I think as you read in my objection the number of hours that were

billed should be substantially reduced.

They're asking for $30 million and $5 million in expenses. I think if they were to receive 12 percent of the $99 million, that would be extremely fair based on all the work that was done for them.

I did not see a lot of rebuttal in their reply to my objection relating to the fee issue, because there is no objection. I think if you are going to go through some of the billing audit for the firm that you mentioned, you should maybe look at some of the other law firms as well. It might not just start with them and end with them.

That is all I have to say, unless you have any questions.

THE COURT: No, thank you.

Does anyone else wish to be heard? OK.

I have reviewed the voluminous papers. With respect to the settlement itself, I have considered the Grinnell factors and the other governing authorities. I have done so also with respect to the plan of allocation. The settlement is fair, reasonable and adequate by any standard.

There were in fact major problems with damages in this case, even assuming liability. The only claim that survived the motions to dismiss was very narrow, it involved a quarterly review and was therefore very much tougher on that account.

Plaintiffs' counsel is entitled to either prescience

or great good luck for settling this case just before cert was granted. In Halliburton, the odds, from my own personal judgment -- though I have no inside information, of course -- is that if I were to reject this settlement, we would go back to square zero, but the class what the class would get here would be zero. I think the Supreme Court is likely to rule adversely to the plaintiffs' bar and to the plaintiffs' securities world in Halliburton, and if they do that -- and that seems to be the early morning line anyway -- this case would be dead in the water. So, $99 million is a whole lot better than that; I really have no doubt about that. I see no reason to write on it; I will simply sign the order approving the settlement.

The fee application is another matter. I have said on other occasions in other places that I am very dissatisfied personally with the lack of any wholly satisfactory way of fixing fees in cases like this. There are all kinds of incentives that are at work. Without meaning to imply bath faith on anybody's part, I am talking about economic incentives, and other circumstances that make percentage recovery very difficult as a measure, that make the lodestar measure very difficult as a measure; and until someone brighter than I comes to a happy medium, we just have to do the best we can.

I haven't come out in my mind yet on exactly what I

will do with the fee application. It is I think noteworthy that the fee requested is such a big discount from the lodestar, but the significance of that fact is undermined by how questionable the lodestar is as a measure of value in these cases to begin with.

I am most deeply troubled with the application on behalf of Saxena White, which is based on a lodestar of nearly $6 million for 23 months' work, and until I picked up the fee applications I had never heard of the fact that they were in the case at all.

The work in this case was done by the Bernstein firm and the Kessler firm, and I know it and everybody else does, in the main. I don't mean to denigrate some of the other firms that did significant amounts, but this case was handled by them.

So, I will let you know where I come out, but I am quite troubled about the Saxena firm, and anything they can provide me to substantiate the fairness, the reasonableness of anything approaching the fee that they are seeking, would be in their interest to provide. So, I will reserve decision on that one.

So far as Mr. Andrews' objection is concerned, Mr. Andrews, I know where you are coming from. The collapse of Lehman Brothers was a horror. All sorts of bad things appear to have happened that brought that about. There is now a vast

literature on the subject, there are at least two movies, I think. I know I've seen at least one and maybe two. I will never know how accurate any of it is, of course. But there it is. You've got every right to be angry. I'm angry. Being angry doesn't necessarily make a good law case.

What seems to have been the centerpiece of your written objections, the so-called missing expert reports, seems in my mind to be based on a misapprehension of the way the world works in relation to the settlement of cases and in relation to expert reports in litigation.

I didn't ask your professional background, and I'm not sure I know what it is. I don't know if you are a lawyer. But quite typically -- and of course I don't know exactly what happened here -- but quite typically plaintiffs hire experts who make the most aggressive case for the plaintiff's point of view, defendants hire experts who make the most aggressive case for the defendant's point of view.

I am confident, based on 45 years of litigation experience both as a lawyer and as a judge that the release of any defense expert reports that may have existed would not have made plaintiff class members very happy. They would have tended to show, if believed, that this case wasn't worth anywhere near what you may think it's worth and perhaps not even anything near what ultimately is being paid, though I don't know that. And I can be sure that the plaintiffs'

experts were telling them that they could justify figures well above $99 million. And, moreover, I don't know for a fact that any of these reports were ever reduced to writing. I'm sure in the colloquial sense experts were consulted and views exchanged. Certainly a lot of money was spent on experts.

But I think can take to the bank what I have just said about what likely happened, and the release of partisan expert views on one side or the other would not have added greatly to your store of knowledge or mine, to tell you the truth. It's just the way the world works.

There are occasions when courts have appointed their own experts in circumstances not so dissimilar to this. I have done it myself in the settlement of an antitrust case. It was in that particular case for very specialized reasons extremely helpful. It is my judgment that it would not have been helpful here, and it would have just added to the expense, and it would have added significantly, and it would have reduced the money eventually paid out to the class. That's what it would have done, in my judgment.

So, once again, I appreciate your taking the time and the effort that went into this on your part. It was something you thought in your own interest, and you had every right to do it, and I accept that in your mind it was in the interest of others, and that's all fine and laudatory. But in the end the objections are all overruled; I think they are not meritorious

despite having been made in good faith.

As for your interesting proposition about the New York Attorney General and all of that, I think you have come to the party too late. All of this could have been proposed by you earlier. You could probably propose it now, and if everybody thinks it's a great idea, I'm sure they will come running back and ask me to change my order, but I'm not expecting anyone to beat a path to my door, and the line around the courthouse every morning would be for other reasons.

Anything further, folks?

MR. BERGER: Thank you, your Honor. Your Honor, I have proposed orders in the E&Y judgment with regard to the settlement, and the plan of allocation separate orders because they are separate.

THE COURT: I think I have those. My law clerk just handed me a letter dated the day before yesterday which had a motion for approval of payment of eligible claims in process, etc. I guess that's what it had. Is there an order on that that you want to provide me with?

MR. STICKNEY: No, your Honor. I believe there is a transmittal letter that comes with that. I believe, because certain claims are being denied, there is an opportunity for people to contest that, so I think we need to give it another week or so.

THE COURT: OK. So that's just going to be pending

for a short time.

MR. STICKNEY: Yes.

THE COURT: OK. And on the fee order, it would be helpful to me if you would submit it in a different form.

I don't wish to sign an order that says I approve X million dollars in fees and Y million dollars in expenses.

I would like to sign an order that says I approve the fees and expenses set forth firm by firm on the attached schedule. You can give me that form of order, and you can stick the expense numbers in. You can type them in because I see no problem with those. And you can leave the fee numbers blank, and I will fill them in. OK?

MR. BERGER: Yes, we will get that down to you.

THE COURT: Thank you.

Mr. White?

MR. WHITE: Your Honor asked us to provide you with material. I would just ask that we be provided with a little bit of time with the Easter holidays. I am actually out of the country starting tomorrow at ten a.m. until Tuesday, so if we could have until the end of next week, that would be perfect.

THE COURT: That's fine. I trust there are actual contemporaneous records, right?

MR. WHITE: There is, your Honor. Well, they're done digitally.

THE COURT: But the entries were made

contemporaneously, that's the point.

MR. WHITE: Yes, your Honor.

THE COURT: I would like an affidavit to that fact.

MR. WHITE: Yes, your Honor.

THE COURT: And, Mr. Berger, just one more thing. I think when you were, at least in my eye, sitting listening to me talking about securities litigation at the Bar Association a couple years ago with what I took to be a horrified look on your face, I think I said on that occasion that one of the strong arguments for the private securities system continuing if not entirely in the form it's in today is the fact that it is a means of securities law enforcement independent of the political fortunes in Washington and the SEC's budget, and you're right to point out that this case proves that.

MR. BERGER: Thank you so much, your Honor. And although I may have had that look in my eye, I did take heart because you were looking maybe a little bit at my direction when you said that there are exceptions.

THE COURT: Don't worry about it.

MR. BERGER: Thank you very much for that, your Honor.